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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JOHN MORRISON et al., Plaintiffs and Appellants, v. GARY ALLEN WILSON et al., Defendants and Respondents.	F056613 (Super. Ct. No. S1500CV260346) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Ana M. Soares; John Morrison and Rajean Morris, in pro. per., for Plaintiffs and Appellants.

Carlson Law Group, Mark C. Carlson and Anne M. Watson for Defendants and Respondents.

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INTRODUCTION

Kern County homebuyers appeal from judgments of dismissal in favor of their seller/builder and real estate representatives after the superior court sustained demurrers without leave to amend a fourth amended complaint alleging, among other things, fraudulent concealment, breach of contract, and negligence arising from the construction of their home in Pine Mountain Club. We affirm.

STATEMENT OF THE CASE

On March 10, 2008, Arlen,[1] Rajean, and John Morrison ("Morrisons") filed a fourth amended civil complaint in Kern County Superior Court. The Morrisons named as defendants the principals of Mountain Properties Partners,[2] a real estate business; Snowman Design Group, Inc., a California Corporation; and Linda, Kurt, and Tim East, individuals associated with Snowman Design Group, Inc. The Morrisons alleged causes of action for fraudulent concealment, breach of contract and implied warranty, negligent construction, a violation of Business and Professions Code section 7031, subdivision (b) [actions by contractor], alter ego, and promissory estoppel arising from the purchase and construction of a home in Pine Mountain Club. The Morrisons prayed for $366,112 in compensatory damages against all defendants and for punitive damages against Snowman Design Group, Inc., as well as attorney fees and costs of suit.

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[1] Arlen Morrison is the minor son of Rajean and John Morrison and was not a signatory or party to the underlying new construction residential purchase agreement dated December 14, 2005.

[2] Mountain Properties Partners is a real estate business solely owned by Gary Allen Wilson (California Real Estate Broker Lic. No. 01139925) and Earl Gebel. According to the fourth amended complaint, Wilson and Gebel do business as Mountain Properties Partners.

On April 11, 2008, the principals of Mountain Properties Partners demurred and moved to strike portions of the fourth amended complaint. On April 29, 2008, the court filed a minute order acknowledging the Morrisons' partial settlement with Snowman Design Group, Inc.

On July 2, 2008, the court sustained the demurrer without leave to amend and granted a formal judgment of dismissal against the Morrisons and in favor of the principals of Mountain Properties Partners. On September 4, 2008, the court filed another judgment dismissing the action with prejudice as to the principals of the Snowman Design Group, Inc. and awarding the Morrisons the sum of $17,500 against the Snowman corporation.

On November 3, 2008, the Morrisons filed a timely notice of appeal from the two judgments of dismissal.[3]

STATEMENT OF FACTS

In December 2005, appellants, Rajean and John Morrison, purchased residential real property in Pine Mountain Club, California from the Snowman Design Group, Inc. (Snowman). Jennings Realty, as listing broker, represented the seller in the transaction and respondent, Mountain Properties Partner, a real

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[3] The Morrisons filed their notice of appeal from the judgment entered on September 8, 2008. The notice of entry of judgment filed on that date incorporated by reference the July 2, 2008, judgment of dismissal of Wilson and Gebel doing business as Mountain Properties Partners and the September 4, 2008, judgment dismissing Linda, Kurt, and Tim East (Code Civ. Proc., § 998) and rendering a judgment of $17,500 for the Morrisons as against Snowman.

An order of dismissal is appealable if it is (1) in writing; (2) signed by the court; and (3) filed in the action. (Code Civ. Proc., § 581d; *Cano v. Glover* (2006) 143 Cal.App.4th 326, 328, fn. 1.) The judgments in this case satisfy these requirements. The September 4, 2008, judgment of dismissal was rendered in the Morrisons' favor and they may not challenge it on appeal. (*Marich v. MGM/UA Telecommunications, Inc.* (2003) 113 Cal.App.4th 415, 431.)

property broker, represented the Morrisons in the transaction through their salesperson, Amanda Kaufman. Respondent, Kurt East, president of the seller/builder, Snowman, represented to appellants he would build a home to meet their needs. East was not licensed by the Contractors' State License Board, and Mountain Properties Partners and Kaufman never informed appellants of that fact.[4] The completed home had numerous defects and building code violations.

The Morrisons filed their initial complaint in superior court on March 13, 2007, and filed a number of amended complaints in the succeeding year. On March 10, 2008, the Morrisons filed a fourth amended complaint. On April 22, 2008, the Morrisons entered into a partial settlement with Snowman as a corporation and with Linda, Kurt, and Tim East as individuals. That same month, Mountain Properties Partners demurred to the fourth amended complaint and moved to strike portions of that complaint.

On June 4, 2008, the trial court sustained the demurrers without leave to amend and subsequently entered a judgment of dismissal as to Mountain Properties Partners and its principals. On September 4, 2008, the trial court filed a separate judgment dismissing the action with prejudice as to Linda, Kurt, and Tim

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[4] On August 20, 2007, the Morrisons filed a "reply in motion to amend the first amended complaint." Attached as Exhibit A-1 to that reply was a copy of permit No. K200602463 issued by the Kern County Department of Engineering and Survey Services (Building Inspection Division) for the construction of the Morrisons' home in Pine Mountain Club. The permit listed Snowman Design as the owner of the project and "Tim East Construction License No. 859680" as the contractor. At oral argument on appeal, counsel for Mountain Properties' Partners confirmed that the Morrisons' residence in Pine Mountain Club was constructed under the state contractor's license of Tim East (Lic. No. 859680).

East pursuant to offers to compromise (Code Civ. Proc., § 998) and rendering a $17,500 judgment against Snowman.[5]

DISCUSSION

I. DID THE TRIAL COURT ERRONEOUSLY SUSTAIN THE DEMURRERS OR FAIL TO GRANT LEAVE TO AMEND THE FOURTH AMENDED COMPLAINT?

The Morrisons contend the trial court abused its discretion by sustaining the demurrers without leave to amend. They specifically challenge the demurrers of Mountain Properties Partners to the second and fourth causes of action of the fourth amended complaint.

A. Governing Law

On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing

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[5] At the May 23, 2008, contested hearing, the Morrisons' counsel stated: "[W]e have settled against all the other parties except for the realtor, which is Mountain Properties and Gary Wilson."

Counsel's statement requires further explanation. On May 1, 2008, Kurt East, Linda East, Tim East, and Snowman Design Group, Inc., filed a motion for determination of good faith settlement (Code Civ. Proc., § 877.6). That motion reflected a proposed total monetary settlement of $42,000 ($35,000 payable by Snowman, $1,000 payable by Kurt East, $1,000 payable by Linda East, and $5,000 payable by Tim East). On June 3, 2008, the court granted the unopposed motion by minute order (Code Civ. Proc., § 877.6, subd. (a)(2)). The court also filed a formal order on the motion that same date, although the formal order did not set forth a specific monetary amount. On August 6, 2008, appellants filed a memorandum of law noting: "To date $17,500 of the Settlement has not been paid by the Defendants." On September 4, 2008, the court filed a formal judgment dismissing Kurt, Linda, and Tim East as defendants "with prejudice pursuant to [Code of Civil Procedure section] 998 Offers to Compromise." The court also rendered judgment "in favor of plaintiffs RAJEAN and JOHN MORRISON and against defendant SNOWMAN DESIGN GROUP, INC., in the amount of $17,500.00 from the date of the judgment, all parties to bear their own costs and attorney's fees."

court gives the complaint a reasonable interpretation and treats the demurrer as admitting all material facts properly pleaded. The court does not assume the truth of contentions, deductions, or conclusions of law. When a demurrer is sustained, a reviewing court determines whether the complaint states facts sufficient to constitute a cause of action. When it is sustained without leave to amend, the reviewing court decides whether there is a reasonable possibility the defect can be cured by amendment. If the defect can be cured, the trial court has abused its discretion and the reviewing court reverses the judgment of dismissal. If the defect cannot be cured, there has been no abuse of discretion and the reviewing court affirms. The burden of proving a reasonable possibility is on the plaintiff. (*Singhania v. Uttarwar* (2006) 136 Cal.App.4th 416, 425-426.)

The judgment will be affirmed if it is proper on any grounds raised in the motion even if the court did not rely on those grounds. (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 989; see also *Mack v. State Bar* (2001) 92 Cal.App.4th 957, 961.) The reviewing court is not bound by the determination of the trial court but is required to render its independent judgment on whether a cause of action has been stated. (*Hoffman v. State Farm Fire & Casualty Co.* (1993) 16 Cal.App.4th 184, 189.)

To find an abuse of discretion, the plaintiff must show how the complaint can be amended to state a cause of action. Such a showing need not be made in the trial court so long as it is made to the reviewing court. Although a demurrer ruling remains open on appeal, it is the trial court's discretion that is at issue. The reviewing court may only determine, as a matter of law, whether the trial court's discretion was abused. Absent an effective request for leave to amend in specified ways, an abuse of discretion can be found only if a potentially effective

amendment is both apparent and consistent with the plaintiff's theory of the case. (*Dey v. Continental Central Credit* (2008) 170 Cal.App.4th 721, 731.)

B. The Morrisons' Cause of Action for Breach of Fiduciary Duty

The Morrisons contend the fourth cause of action of their second amended complaint sets forth sufficient facts to allege a cause of action for breach of a fiduciary duty by the principals of Mountain Properties Partners.

The Morrisons' minor son, Arlen, was included as a party plaintiff to the second amended complaint, filed August 28, 2007. The fourth cause of action of that complaint alleged in pertinent part:

> "39. Under the doctrine of respondeat superior, an employee/agent as in this case, agent Amanda Kaufman, is alleged to have engaged in tortious conduct as an outgrowth of her employment by Mountain Properties and its broker, Gary Allen Wilson. The acts of his agent, Amanda Kaufman, were completely within the course and scope of her employment. Therefore, Mountain Properties is liable for the misrepresentations, both intentional and negligent, failure to warn, and concealment of material facts, which led to the Plaintiffs' purchase of a home from Snowman Design Group, Inc.
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> "39. [*sic*] The real estate broker as a fiduciary has a duty to learn the material facts that may affect the principal's decision. He or she is hired for his or her professional knowledge and skill. He or she is expected to perform the necessary research and investigation in order to know those important matters that will affect the principal's decision, and he or she has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision. The real estate agent's duty to disclose material information to the principal includes the duty to disclose reasonably obtainable material information. Amanda Kaufman and Gary Allen Wilson failed to advise the Plaintiffs regarding suitable homes on the market and convey offers the Plaintiffs were prepared to make on homes they were shown. The aforesaid agent and broker arranged a meeting between Kurt East and the Plaintiffs despite the fact they knew or should have known he was not a licensed contractor, and despite the

> fact there were at least six other licensed home builders operating in the Pine Mountain Club area. The agent and broker failed to arrange meetings with licensed home builders or inform the Plaintiffs about other builders. The Plaintiffs could have purchased a resale home for the same price they paid Kurt East. However, the Defendants Gary Allen Wilson and Mountain Properties failed to assist the Plaintiffs to purchase such a home despite their fiduciary duty to the Plaintiffs."

The principals of Mountain Properties Partners demurred to the second amended complaint on October 24, 2007, and alleged the fourth cause of action for breach of fiduciary duty failed to state facts sufficient to constitute a valid cause of action by minor Arlen Morrison. The demurrer did not reference the validity of the cause of action with respect to Rajean and John Morrison. On November 28, 2007, the court conducted a hearing on the demurrer and ruled by minute order: "DEFENDANTS, GARY ALLEN WILSON AND GARY WILSON & EARL GEBEL DBA MOUNTAIN PROPERTIES PARTNER'S DEMURRER IS SUSTAINED AS TO MINORS AND 1ST AND 4TH CAUSES OF ACTION WITHOUT LEAVE TO AMEND."

In the instant appeal, the Morrisons contend they eliminated their minor son, Arlen, as a party plaintiff in succeeding amended complaints, thus curing the defect identified by the trial court at the November 28, 2007, hearing. They maintain the facts stated in their second amended complaint were sufficiently particular to establish the fiduciary duty of their real estate representative and the breach of that duty. Although the Morrisons' second amended complaint included a separately stated cause of action for breach of fiduciary duty, a careful review of the Morrisons' fourth amended complaint does not reveal any such a cause of action, although the phrase "fiduciary duty" is used in the second cause of action for breach of contract and implied warranty. The court did not address an alleged

breach of fiduciary duty when it conducted the May 23, 2008, hearing on defendants' demurrers to the fourth amended complaint.

A complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language. (Code Civ. Proc., § 425.10, subd. (a)(1).) This is a fact-pleading requirement that obligates a plaintiff to allege ultimate facts that apprise the adversary of the factual basis of the claim. When a complaint is properly pleaded, the cause of action will always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, along with the facts that constitute the defendant's act of wrong. (*Davaloo v. State Farm Ins. Co.* (2005) 135 Cal.App.4th 409, 415.) We acknowledge the policy of the law is to construe pleadings liberally to the end that cases be tried on their merits rather than be disposed of on technicalities. Mistaken labels and confusion of legal theory are not fatal. If a complaint states a cause of action on any theory, the plaintiff is entitled to introduce evidence on that theory and the action cannot be defeated simply because of misnaming. (*Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 833.)

The second amended complaint in the instant case alleged a breach of fiduciary duty in ordinary and concise language. That same language does not appear to be present in the fourth amended complaint nor was it referenced at the May 23, 2008, hearing on the demurrers to that complaint. An amended complaint supersedes the original complaint and furnishes the sole basis for a cause of action. The original complaint is dropped out of the case. Such original complaint ceases to have any effect as a pleading and cannot serve as a basis for a judgment. (*Bassett v. Lakeside Inn, Inc.* (2006) 140 Cal.App.4th 863, 869-870.) Moreover, the sufficiency of an entirely superseded pleading is not considered on review. (*Singhania v. Uttarwar, supra,* 136 Cal.App.4th at p. 425.) Expressed another

way, an amended pleading supplants all prior complaints and the amended pleading alone will be considered by the reviewing court. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 884.)

The Morrisons nevertheless contend they could not appeal the trial court's order as to the second amended complaint until the entry of a final judgment. Since judgments of dismissal were entered on September 8, 2008, they now challenge "the court's ruling granting the Demurrer of Mountain Properties to the [second amended complaint] *without leave to amend* the 1st and 4th causes of action [for fraud and breach of fiduciary duty, respectively] stated against Mountain Properties." Generally, when any court makes an order sustaining a demurrer without leave to amend, the question as to whether or not such court abused its discretion in making such an order is "open on appeal" even though no request to amend such pleading was made. (Code Civ. Proc., § 472c, subd. (a).) Expressed another way, when an order sustains a demurrer without leave to amend, the appeal is from the judgment of dismissal. (*Farwell v. Sunset Mesa Property Owners Assn., Inc.* (2008) 163 Cal.App.4th 1545, 1551.)

Thus, by filing the instant appeal from the judgments of dismissal, the Morrisons may properly challenge the trial court's ruling on the fourth cause of action in the second amended complaint. The minute order of the November 28, 2007, contested hearing sustained the demurrers to the second amended complaint "as to minors [*sic*] and 1st and 4th causes of action without leave to amend." On appeal from a judgment of dismissal after an order sustaining a demurrer, our standard of review is de novo. In other words, we exercise our independent judgment about whether the complaint states a cause of action as a matter of law. (*Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 650.) In reviewing the complaint, we assume the truth of all facts properly

pleaded by the plaintiffs as well as those facts that are judicially noticeable. (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814.) Further, to the extent the issue is one of statutory interpretation, we review this question of law de novo. (*Bialo v. Western Mutual Ins. Co.* (2002) 95 Cal.App.4th 68, 76-77.)

Our de novo review of the record reveals that Rajean and John Morrison--as to themselves and their minor son Arlen Morrison--pleaded a breach of fiduciary duty in the fourth cause of action in the second amended complaint. Wilson and Gebel, doing business as Mountain Properties Partners, demurred to that cause of action because the minor was neither a party to nor a beneficiary of the purchase agreement, citing *Coldwell Banker Residential Brokerage Company, Inc. v. Superior Court* (2004) 117 Cal.App.4th 158. In their response filed November 6, 2007, the Morrisons stated: "Plaintiffs agree with Defendants that Arlen Morrison cannot be a party to the causes of action against the broker and Mountain Properties, and respectfully requests leave to amend to remove Arlen Morrison from the causes of action against those defendants." At the November 28, 2007, hearing, the court sustained the demurrer to the first and fourth causes of action as to minor without leave to amend. The court did not sustain the demurrer to the fourth cause of action as to Rajean and John Morrison. Nevertheless, their subsequent amended complaints did not reallege this cause of action.

The trial court did not abuse its discretion in sustaining the demurrer with respect to minor Arlen Morrison and did not preclude Rajean and John Morrison from realleging a breach of fiduciary duty with respect to themselves. Their subsequent amended complaints supplanted the second amended complaint and

the Morrisons' claims regarding the cause of action for alleged breach of fiduciary duty as set forth in the second amended complaint are not cognizable on appeal.[6]

C. The Morrisons' Cause of Action for Breach of Contractual Duty

The second cause of action of the fourth amended complaint alleged a breach of contract and breach of implied warranty by the principals of Mountain Properties Partners.

As to the Mountain Properties Partners defendants, Gary Allen Wilson and Earl Gebel, the Morrisons essentially alleged the pair "breached their oral real estate sales contract with John and Rajean Morrison by failing to represent them as their broker and agent in the manner expected under state law and generally accepted standards in the real estate profession."[7] The Morrisons further alleged

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[6] The Morrisons nevertheless argue that Kaufman and the principals of Mountain Properties Partners breached their fiduciary duty to inspect the residence under construction and to reveal structural effects and other material facts bearing on the value of the home. Civil Code section 2079, subdivision (a) states in relevant part: "It is the duty of a real estate broker or salesperson … to a prospective purchaser of residential real property … to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal, if that broker has a written contract with the seller to find or obtain a buyer or is a broker who acts in cooperation with that broker to find and obtain a buyer." The inspection and disclosure duties of residential real estate brokers and their agents apply exclusively to prospective buyers and not to other persons who are not parties to the real estate transaction. (*Coldwell Banker Residential Brokerage Co. v. Superior Court*, *supra*, 117 Cal.App.4th at p. 165.)

[7] In their opening brief on appeal, the Morrisons assert "they signed an exclusive buyer's agent agreement with Mountain Properties, who were going to help them locate a home in Pine Mountain." We have been unable to find any such written agreement in the record on appeal or superior court file. In any event, the Morrisons' contention about a written agreement is contrary to their

that Amanda Kaufman, an agent with Mountain Properties Partners, verbally agreed to represent the Morrisons as their exclusive buyers' agent, that Kaufman indicated that Snowman was a builder of custom homes, and that she failed to inform the Morrisons that neither Snowman nor Kurt East was a licensed contractor. The Morrisons also alleged that neither Kaufman nor any other representative of Mountain Properties Partners conducted a visual inspection of the home prior to the close of escrow (Civ. Code, § 2079).

Civil Code section 1622 provides that all contracts may be oral, except those that are specially required by statute to be in writing. Civil Code section 1624 states in relevant part:

> "(a) The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent: [¶] . . . [¶]
>
> "(4) An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate . . . or find a purchaser or seller of real estate . . . for compensation or a commission."

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allegations in paragraph 2 of the fourth amended complaint, which states: "Plaintiffs entered into an exclusive oral agreement around or about October of 2005 whereby Mountain Properties represented them as their agent for the purchase of a home in Pine Mountain Club." A plaintiff may not discard factual allegations of a prior complaint or avoid them by contradictory averments in a superseding, amended pleading. (*People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 957.) On appeal from a judgment of dismissal following the sustaining of a demurrer without leave to amend, a reviewing court assumes the truth of all properly pleaded facts. (*Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 633, fn. 3.) Here, the properly pleaded fact was that of an oral--not written--contract underlying the relationship between the Morrisons and Mountain Properties Partners. Further, we cannot deem the December 14, 2005, construction and residential purchase agreement to be the relevant written contract because the Morrisons acknowledge in their opening brief that "the broker is not a party to the real estate contract between the buyer and seller of real property."

An oral broker's commission agreement between a licensed real estate broker and a real property buyer is subject to the requirements of Civil Code section 1624, subdivision (a)(4). (*Phillippe v. Shapell Industries, Inc.* (1987) 43 Cal.3d 1247, 1255-1256.) Absent a note or memorandum signed by the party to be charged, such a contract is invalid. (Civ. Code, § 1624, subd. (a).) The Morrisons alleged an oral contract in the instant case but did not allege that the contract had been reduced to a note or memorandum signed by the party to be charged. The Morrisons also alleged that Mountain Properties Partners had a duty to investigate and disclose material defects and facts materially affecting the value of the property. While the Morrisons cited to Civil Code section 2079 with respect to duty, their allegations were predicated on a breach of the alleged oral contact. Absent an allegation of a written note or memorandum, the alleged contract was invalid. The Morrisons cannot amend the complaint to now allege a written contract because that would be inconsistent with their theory of the case. Moreover, under the circumstances, we need not analyze the question of whether respondents fulfilled the requirements of Civil Code section 2079, subdivision (a).

The trial court properly exercised its discretion by sustaining the demurrer to the fourth cause of action of the fourth amended complaint without leave to amend.

D. <u>The Morrisons' Cause of Action for Promissory Estoppel</u>

The Morrisons lastly contend they stated a claim for promissory estoppel in their fourth amended complaint.

In their fifth cause of action, the Morrisons alleged they relied on the express promises of Amanda Kaufman that (a) they would close the house escrow by June 2006; (b) she would represent them and obtain a home for them; and (c) Snowman and Kurt East were homebuilders. The principals of Mountain

Properties Partners demurred on the ground the complaint failed to sufficiently state of case of action and was uncertain. The trial court sustained the demurrer, holding: "AS TO THE FIFTH CAUSE OF ACTION [THE FOURTH AMENDED COMPLAINT] REMAINS UNCERTAIN TO THE EXTENT OF FAILING TO STATE A CAUSE OF ACTION. CCP SECTION 430.10(E) AND (F)."

On appeal, the Morrisons contend that Mountain Properties Partners brought the buyer and the builder together and signed the contract with them, the terms being drawn up by the agent of Snowman. The Morrisons submit that for purposes of promissory estoppel, a promise can be oral and the reliance can be upon conduct. They conclude: "It is clear from the Fourth Amended Complaint and its allegations that the Morrisons would not have chosen Snowman Design Group, Inc. to build them a home if it were not for the recommendation of their real estate agent and broker, on whom they relied, and trusted."

The elements of a promissory estoppel claim are: (1) a promise that is clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his or her reliance. Promissory estoppel employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise to be enforced. Because the doctrine of promissory estoppel is equitable, courts have wide discretion in its application. In other words, courts are given broad discretion to allow or deny such claims. (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901-902, 904.)

A cause of action for promissory estoppel is basically the same as that in contract actions but missing the consideration element. (*Yari v. Producers Guild of America, Inc.* (2008) 161 Cal.App.4th 172, 182.) A cause of action for breach of contract requires pleading of a contract, plaintiff's performance or excuse for

failure to perform, defendant's breach, and damage to plaintiff resulting therefrom. (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1489.) In the instant case, the Morrisons alleged that Kaufman and Mountain Properties Partners breached their promise that the home escrow would close by June of 2006 so that John Morrison could benefit from closing and relocation expenses provided by his employer. They further alleged "Mountain Properties, through Amanda Kaufman, agreed that close of escrow would occur by June of 2006, and put this date on a form at the time of signing the real estate contract." However, the December 2005 written contract between the Morrisons and their seller/builder clearly stated that close of escrow would occur "upon completion" as opposed to a specific date. Given the express language of the purchase contract, we cannot conceive of a potentially effective amended complaint that would be consistent with the Morrisons' theory of the case.

The Morrisons also alleged that Kaufman and Mountain Properties Partners made express promises to make offers on homes but ultimately failed to place set offers on two homes the Morrisons were interested in purchasing. The Morrisons went on to plead that they reasonably expected Kaufman "to represent them and obtain a home for them." The latter allegations were at odds with the earlier ones regarding the failure "to place a set offer on two different homes," particularly where Kaufman and Mountain Properties Partners facilitated the Morrisons' ultimate acquisition of a home in Pine Mountain Club. Thus, we cannot say an "unambiguous promise" was alleged in the fourth amended complaint. The trial court did not abuse its discretion in denying leave to amend where appellants had ample prior opportunities to marshal the salient facts to set forth a cause of action for promissory estoppel.

Further, the party claiming estoppel must specifically plead all facts relied on to establish its elements. One essential element is detrimental reliance by the promisee. (*Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 48.) The Morrisons' fourth amended complaint sets forth conclusionary allegations that "[i]t was reasonable for John and Rajean Morrison to expect Amanda Kaufman to place the offers on the two homes as that was her job as their realtor, and she had promised to represent them and obtain a home for them." Even if we assume that this amounts to an allegation of detrimental reliance, the Morrisons do not allege facts to show they changed their position in any way because of what they had been promised by Kaufman and Mountain Properties Partners. (*Ibid.*)

The Morrisons also alleged that Kaufman "expressly promised" that Snowman and Kurt East were homebuilders. As respondents point out on appeal, this is not the equivalent of a representation regarding the licensure of Snowman, East, or other homebuilders at Pine Mountain Club. The Morrisons never clearly allege whether or not Kaufman made any express promises regarding the licensure of Snowman or Kurt East. The Morrisons did allege: "It was reasonable for the Plaintiffs [*sic*] that Snowman Design Group was a licensed builder because they relied on the duty to disclose and the care, prudence and diligence expected from their agent and broker under Civil Code 2079 and other state statutes and common law."

The Morrisons cite the fiduciary duty of Kaufman and Mountain Properties Partners in the context of a cause of action for promissory estoppel. "Promissory estoppel applies whenever a 'promise which the promissor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance' would result in an 'injustice' if

the promise were not enforced." (*Lange v. TIG Ins. Co.* (1998) 68 Cal.App.4th 1179, 1185.) However, to be binding, the promise must be clear and unambiguous in its terms. (*Laks v. Coast Fed. Sav. & Loan Assn.* (1976) 60 Cal.App.3d 885, 890.) Further, the party to whom the promise is made must rely on the promise and that reliance must be both reasonable and foreseeable. Finally, the party asserting the estoppel must be injured by his or her reliance. (*Ibid.*) Whether an estoppel exists is a question of fact unless only one inference can be drawn from the evidence. (*Henry v. Weinman* (1958) 157 Cal.App.2d 360, 366.)

In the instant case, the Morrisons once again have not alleged a promise that is clear and unambiguous in its terms. Nor do they propose a mode of amendment that would set forth a clear and unambiguous promise to serve as a foundation for a cause of action for promissory estoppel. In view of the foregoing facts and circumstances, the trial court did not abuse its discretion in sustaining the demurrers without leave to amend.

II. DID APPELLANTS STATE CAUSES OF ACTION FOR FRAUDULENT CONCEALMENT, INTENTIONAL OR NEGLIGENT MISREPRESENTATION, AND ACTUAL OR CONSTRUCTIVE FRAUD?

The Morrisons contend their second amended complaint stated causes of action against Mountain Properties Partners for fraudulent concealment, intentional or negligent misrepresentation, and actual or constructive fraud.

An amended complaint supersedes the original complaint and furnishes the sole basis for a cause of action. The original complaint is dropped out of the case. Such original complaint ceases to have any effect as a pleading and cannot serve as a basis for a judgment. (*Bassett v. Lakeside Inn, Inc.*, *supra,* 140 Cal.App.4th 863 at pp. 869-870.) Moreover, the sufficiency of an entirely superseded pleading is not considered on review. (*Singhania v. Uttarwar*, *supra,* 136 Cal.App.4th at p. 425.) Expressed another way, an amended pleading supplants all prior complaints

and the amended pleading alone will be considered by the reviewing court. (*Foreman & Clark Corp. v. Fallon, supra,* 3 Cal.3d at p. 884.)

In view of these longstanding principles, the Morrisons' claims regarding the second amended complaint are not cognizable on appeal.

DISPOSITION[8]

The judgment is affirmed. Costs to respondents.

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Poochigian, J.

WE CONCUR:

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Cornell, Acting P.J.

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Hill, J.

8 On December 1, 2009, appellants' counsel, Ana M. Soares, filed a motion to withdraw as attorney of record. On December 8, 2009, this court by letter granted appellants leave to file a response to the motion and noted "[i]f no response is filed, the appellants will be deemed to have consented to the withdrawal of counsel and the motion will be granted." Our letter also advised that in the event the motion to withdraw was granted, appellants could act in propria persona or retain new appellate counsel at their expense. On January 6, 2010, this court filed an order noting the failure of appellants to file a response and deeming appellants to have consented to the removal of Soares as attorney of record for appellants. Our order further advised: "Hereafter, appellants will be deemed to be proceeding in the above entitled action in pro. per. unless and until appellants inform this court otherwise."